

**STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION**

**APPLICATION OF DELAWARE ENERGY LLC TO REVOKE
THE INJECTION AUTHORITY GRANTED UNDER SWD-1680
FOR THE ALPHA SWD NO. 1 WELL OPERATED BY
ALPHA SWD OPERATING LLC, EDDY COUNTY, NEW MEXICO**

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**Case No. 15855 (de novo)
Order No. R-14484-A**

MOTION TO STAY INJECTION AUTHORITY GRANTED UNDER SWD-1680

Delaware Energy LLC (“Delaware Energy”) requests that the Commission continue the stay of the injection authority granted under SWD-1680 pending a final determination of an appeal or remand of the Commission’s order vacating Division Order R-14484-A. In support of this motion, Delaware Energy states:

1. Alpha SWD Operating LLC (“Alpha”) has appealed Division Order R-14484-A, which rescinds the injection authority granted by Administrative Order SWD-1680 for a commercial disposal well in the Devonian and Silurian formations.

2. Division Order R-14484-A rescinds the administrative approval of Alpha’s proposed disposal well after reviewing the administrative record and finding Administrative Order SWD-1680 was issued in violation of the procedures set forth in NMAC 19.15.26.8. *See* Order R-14484-A at p. 3, ¶¶ (11)-(17).

3. Division Order R-14484-A was issued under an application for a Division Examiner hearing filed by Delaware Energy under NMAC 19.15.4.8 and the Oil and Gas Act. *See, e.g.,* NMSA 1978, §§70-2-6, 70-2-7, 70-2-11, 70-2-12 and 70-2-13. In its application, Delaware

Energy asserted that it has a prior- filed application pending before the Division for a disposal well in the same area and in the same disposal zone.

4. Prior to the Division Examiner Hearing, the Division Director issued an Emergency Stay Order suspending Administrative Order SWD-1680 pending a review by the Division Examiners. *See* Order R-14484.

5. At the adjudicatory hearing before two Division Examiners, Delaware Energy established that its prior filed application for a disposal well was “suspended” by the Division for a period while Delaware Energy worked successfully to resolve filed protests. Nonetheless, Alpha’s subsequently filed application for a disposal well in the same area and same disposal zone was approved administratively:

- a. without notice to Delaware Energy;
- b. without consideration of Delaware Energy’s prior-filed application for a disposal well; and
- c. prematurely under the provisions of NMAC 19.15.26.8(C).

6. Order R-14484-A reflects that prior to issuance, Division Examiners reviewed the administrative record associated with Administrative Order SWD-1680 to conclude it was issued improperly and must be rescinded. *Id* at p. 3, ¶¶ (11)-(17).

7. At no time prior to or after the issuance of Division Order R-14484-A did Alpha suggest that Division Examiners lacked jurisdiction to review Administrative Order SWD-1680 or that it is improper to review an administrative order under the adjudicatory Examiner Hearing proceedings afforded by Division regulations and the Oil and Gas Act.

8. At the initial April 12, 2018, hearing on Alpha’s de novo appeal, the Commission invited the parties to brief the “threshold issue” of whether Administrative Order SWD-1680 was issued prematurely and to attach to the briefing relevant portions of the administrative record. *See*

Tr. 4/12/18 at pp. 10-19. The Commission set a hearing on May 22nd to address this threshold issue. *Id.* at p. 19. At no time prior to or after the issuance of Division Order R-14484-A did Alpha suggest that Division Examiners lacked jurisdiction to review Administrative Order SWD-1680 or that it is improper to review an administrative order under the adjudicatory Examiner Hearing proceedings afforded by Division regulations and the Oil and Gas Act.

9. Pursuant to the Commission's instructions at the April 12th hearing, both Delaware Energy and Alpha submitted briefs addressing whether Administrative Order SWD-1680 had been issued in violation of the procedures set forth in NMAC 19.15.26.8. Alpha's filed brief did not suggest that Division Examiners lacked jurisdiction to review Administrative Order SWD-1680 or that it is improper to review an administrative order under the adjudicatory Examiner Hearing proceedings afforded by Division regulations and the Oil and Gas Act.

10. At the May 22, 2018, hearing, the parties presented arguments on the threshold issue and discussed what would be addressed under a remand of the case to the Division Examiners. Thereafter, the Commission Chair and Counsel questioned for the first time whether it was proper for Delaware Energy to seek review of Administrative Order SWD-1680 under the Examiner Hearing proceedings afforded by NMAC 19.15.4.8 and the Oil and Gas Act. *See* Tr. 5/22/18 at p. 23. Counsel for the Commission suggested, *sua sponte*, that Division Examiners lacked "jurisdiction" to review Administrative Order SWD-1680 and that Delaware's exclusive remedy was to pursue a "de novo" appeal with the Commission from the Administrative Order. *Id.* at p. 29. After being informed that a "de novo" appeal right only arises following an Examiner Hearing, the Commission's counsel nonetheless suggested more discussion was needed on "puzzling issues." *Id.* at p. 31. Following closed deliberations, the Commission requested briefing

on “the jurisdiction of the Division in the case below, whether they had jurisdiction to consider this matter after a failure to file an appeal under the Oil and Gas Act.” *Id.* at p. 33.

11. Following argument and deliberations at the subsequent hearing on July 20, 2018, the Commission’s Counsel announced that the Commission intended to issue an order vacating Division Order R-14484-A on the grounds that Division Examiners lacked “jurisdiction” to determine whether Administrative Order SWD-1680 had been properly issued. Since the effect of this oral ruling is to reinstate the injection authority granted by Administrative Order SWD-1680, counsel for Delaware Energy requested and orally received from the Commission a stay of Administrative Order SWD-1680.

12. Delaware Energy now asks for a written order extending the stay initially issued by the Division Director under Emergency Order R-14484 and subsequently orally granted by the Commission until there is a final determination of an appeal or remand of the Commission’s anticipated order vacating Division Order R-14484-A.

13. The “jurisdictional” decision reached by the Commission is unprecedented and has a substantial impact on Delaware Energy’s correlative rights. Allowing Alpha to commence drilling and injection operations under Administrative Order SWD-1680 while an appeal or remand is pending will prevent consideration of Delaware Energy’s competing and prior-filed application for a disposal well in the same area and in the same disposal zone.

14. Allowing Alpha to commence drilling and injection operations under Administrative Order SWD-1680 while the unprecedented “jurisdictional” issue is being addressed by an appellate court will result in unanticipated and gross negative consequences to Delaware Energy.

15. In contrast, since it is undisputed that Alpha, upon receipt of Administrative Order SWD-1680, offered to sell the injection authority to Delaware Energy, no substantial harm will result to Alpha if the Commission's stay order is continued pending a resolution of the "jurisdictional" issue.

WHEREFORE, Delaware Energy requests that the Commission stay Administrative Order SWD-1680 pending a final determination of an appeal or remand of the Commission's order vacating Division Order R-14484-A. Pursuant to Division Rule 19.15.4.23(B) NMAC, a proposed order is attached hereto.

Respectfully submitted,

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**Case No. 15855 (de novo)
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**ORDER STAYING INJECTION AUTHORITY GRANTED
UNDER ADMINISTRATIVE ORDER SWD-1680**

This matter has come before the Commission under a motion filed by Delaware Energy LLC (“Delaware Energy”) pursuant to Rule 19.15.4.23(B) NMAC. Having reviewed the motion,

THE COMMISSION FINDS AND CONCLUDES THAT:

1. Alpha SWD Operating LLC (“Alpha”) filed a de novo appeal to the Commission following the issuance of Division Order R-14484-A.
2. Division Order R-14484-A rescinds the injection authority granted to Alpha under Administrative Order SWD-1680 for a commercial disposal well in the Devonian and Silurian formations.
3. Division Order R-14484-A was issued under an application for a Division Examiner Hearing filed by Delaware Energy under NMAC 19.15.4.8 and the Oil and Gas Act. *See, e.g.*, NMSA 1978, §§70-2-6, 70-2-7, 70-2-11, 70-2-12 and 70-2-13.
4. In its application, Delaware Energy asserts that it has a prior-filed application pending before the Division for a disposal well in the same area and in the same disposal zone.

5. Following an Examiner Hearing and a review of the administrative record, the Examiners and the Division Director concluded Administrative Order SWD-1680 was issued in violation of the procedures set forth in NMAC 19.15.26.8. *See* Order R-14484-A at p. 3, ¶¶ (11)-(17).

6. The Commission has determined sua sponte that Division Examiners lacked jurisdiction to address the validity of Administrative Order SWD-1680 and that Division Order R-14484-A should therefore be vacated.

7. At the July 22nd hearing announcing this decision, the Commission also orally granted a stay of Administrative Order SWD-1680 after Delaware Energy announced that it intended to pursue an appeal of the Commission's final order on this jurisdictional issue.

8. Delaware Energy has now filed a motion requesting that the Commission extend the stay until there is a final determination of an appeal or remand of the Commission's order vacating Division Order R-14484-A.

9. The Commission finds that the jurisdictional issue raised by the Commission is one of first impression.

10. The Commission finds that allowing Alpha to commence drilling and injection operations under Administrative Order SWD-1680 while an appeal or remand of the Commission's order is pending will prevent consideration of Delaware Energy's competing application for a disposal well in the same area and in the same disposal zone, thereby impairing Delaware Energy's correlative rights.

11. The Commission finds that allowing Alpha to commence drilling and injection operations under Administrative Order SWD-1680 while the jurisdictional is being addressed by

an appellate court will result in unanticipated and gross negative consequences to Delaware Energy.

12. The Commission finds that a stay of Administrative Order SWD-1680 is necessary to protect correlative rights and to prevent gross negative consequences to Delaware Energy.

IT IS THEREFORE ORDERED THAT Administrative Order SWD-1680 is STAYED until a final decision has been rendered on an appeal or remand of the Commission's order vacating Division Order R-14484-A.

DONE at Santa Fe, New Mexico on August _____, 2018

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ROBERT BALCH, Member

ED MARTIN, Member

HEATHER RILEY, Chair